

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**YVONNE L. BROOKS**

Claimant

VS.

**U.S.D. 253**

Respondent

AND

**KANSAS ASSOCIATION OF SCHOOL BOARDS  
WORKERS COMPENSATION FUND, INC. and  
NETHERLANDS INSURANCE COMPANY**

Insurance Carriers

Docket No. 1,039,052

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier Kansas Association of School Boards Workers Compensation Fund, Inc., appealed the October 8, 2012, Preliminary Hearing Order (Order) entered by Administrative Law Judge (ALJ) Brad E. Avery. James B. Biggs of Topeka, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier Kansas Association of School Boards Workers Compensation Fund, Inc. (KASB). Jason M. Lloyd of Kansas City, Missouri, appeared for respondent and its insurance carrier Netherlands Insurance Company (Netherlands).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 5, 2012, preliminary hearing and exhibits thereto; the transcript of the June 3, 2011, preliminary hearing; the transcript of the June 30, 2011, deposition of Dr. Terrence Pratt and exhibit thereto; the transcript of the June 28, 2010, discovery deposition of claimant;<sup>1</sup> and all pleadings contained in the administrative file.

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<sup>1</sup> The parties agreed at the October 5, 2012, preliminary hearing that the June 28, 2010, deposition of claimant would be part of the record.

### ISSUES

Claimant's application for hearing, filed on March 3, 2008, alleges that she sustained injuries to her right foot, right ankle and all related systems on October 19, 2005. Claimant filed an amended application for hearing on April 23, 2009. It was nearly identical to her original application for hearing, but added left foot and ankle injuries. On June 29, 2010, claimant filed a second amended application for hearing alleging a series of accidents commencing October 19, 2005, and continuing to June 18, 2010, while performing regular job duties. The injuries alleged were right foot, ankle, knee and hip; left foot, ankle and knee; low back and all related systems.

KASB was respondent's insurance carrier through July 30, 2006. Netherlands indicated it provided coverage beginning July 30, 2006, through the present.

At the preliminary hearing, claimant requested medical treatment for her left knee and low back from Dr. Terrence Pratt. KASB admitted claimant sustained a right ankle injury as the result of a single traumatic accident on October 19, 2005. However, KASB denied claimant's left ankle, left knee and low back injuries were the natural and probable consequence of claimant's October 19, 2005, accident.

Netherlands denied claimant sustained a series of repetitive accidents during the time it had provided coverage. Netherlands also alleged that all of claimant's injuries and need for medical treatment were related to the October 19, 2005, traumatic accident.

ALJ Avery authorized Dr. George G. Flutter to provide medical care for claimant's left knee, ankle and low back. He stated in his October 8, 2012, Order:

The Court finds Claimant's left ankle, knee and back problems stem from her October 19, 2005 accidental injury and are a natural and probable consequence thereof. While there are conflicting medical opinions, the Court agrees with the report of Dr. Flutter. In addition, Claimant's discovery deposition testimony of June 29 [sic], 2010 indicates her right ankle injury of 2005 never healed and she has been walking with an altered gait since the injury. An injury is a natural and probable consequence of an accident where a claimant's disability gradually increased as a result of a primary accidental injury, but not when the increased disability resulted from a new and separate accident. *Wietharn v. Safeway Stores, Inc.* 16 Kan. App 2<sup>nd</sup> 188 Syl. 6 (1991).<sup>2</sup>

KASB appeals for the reasons set out above. Netherlands and claimant ask the Board to affirm ALJ Avery's findings. In the alternative, claimant asks the Board to find that claimant suffered personal injuries resulting from a series of repetitive accidents arising out of and in the course of her employment with respondent.

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<sup>2</sup> ALJ Preliminary Hearing Order (Oct. 8, 2012) at 1-2.

The issue is:

Are claimant's left ankle, left knee and back injuries the natural and probable consequence of her single traumatic accident on October 19, 2005?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant is an extended learning after school coordinator for respondent. At the October 5, 2012, preliminary hearing claimant testified that her job required her to purchase groceries and place them, along with cooking utensils, in crates. At the preliminary hearing, claimant testified that a full crate weighed 35 to 40 pounds and claimant would move the crates. This task was performed on a daily basis. At her deposition, claimant testified she would move boxes weighing from 5 to 30 pounds, several times a month. Claimant would also provide after-school activities for children, hire and supervise staff, perform data entry and obtain sponsors for the program.

On October 19, 2005, claimant was picking up pumpkins at a church for her students. As claimant was entering her car, she stepped off the curb and into some leaves and rolled her right ankle on a decorative rock. Claimant heard a series of snaps and pops and felt terrific pain. Claimant called her husband and he took claimant to her personal physician, Dr. Brent Hrabik. Dr. Hrabik's records were not placed into evidence. Claimant testified that the accident occurred on a Wednesday and she returned to full duty on Monday. Prior to her October 19, 2005, accident, claimant had no lower extremity injuries or low back symptoms.

On October 19, 2005, claimant worked at Lowther South, the fifth-grade building. Her supplies were in Lowther South, so she did not have to lift a whole lot. In 2008, claimant was transferred to Lowther North, the sixth-grade building. There she had to purchase more supplies and separate and transfer materials between buildings. Claimant testified that she had no left ankle, left knee or low back symptoms prior to transferring to Lowther North. Claimant indicated that after the right ankle accident, she began using a cane to take pressure off her right ankle. She also used her left leg differently than she previously had.

Claimant received treatment from several medical providers for her right ankle, including Leighton York, a nurse practitioner employed by respondent, and Dr. Peter S. Lepse, an orthopedic specialist. The medical records of Leighton York were not placed into evidence. The earliest of claimant's medical records that were placed into evidence were March 30, 2006, notes of Dr. Lepse. Those notes, which were the only records of Dr. Lepse placed into evidence, indicated that claimant had an antalgic gait and that claimant reported limping since the accident. Claimant testified she was released from

Dr. Lapse's care on September 11, 2006, and had reached maximum medical improvement.

Claimant testified at her deposition that she could not recall a time from the date she sustained her right ankle injury until she was released by Dr. Lapse when she did not limp. When claimant was asked about July 2006 notes from Dr. Lapse that stated her gait was normal and she had a good brisk stride, she denied being able to walk normally and that she had a good brisk stride. Claimant testified that she was still wearing an ankle brace on the right ankle when released from Dr. Lapse's treatment.

Respondent also sent claimant to Drs. Greg Horton and John Fanning for treatment, but their medical records are not in the record.

At her deposition, claimant testified that sometime after the October 2005 accident her left ankle would hurt, but does not recall when. About nine months prior to her deposition on June 28, 2010, claimant noticed her left ankle was getting worse, but could not pinpoint a cause. That was about the time the school year started, and claimant was on her feet on a regular basis. Claimant testified her left ankle pain intensified, her left ankle range of motion decreased and the left ankle swelled. She now wears a brace on her left ankle from the time she gets up until she comes home from school and has left ankle swelling. Claimant testified that being on her feet every day at work made her left ankle symptoms increase.

When asked if her left knee began hurting about the same time her left ankle began bothering her, claimant answered, "Give or take months. I'm not sure."<sup>3</sup> Later claimant testified the left knee pain began before she saw Dr. George G. Flutter on March 31, 2009. Claimant testified at her deposition that although she told Dr. Horton about her left knee, the left knee was never treated. Claimant also testified at her deposition that she saw Dr. Horton on January 31 and July 29, 2008, and complained about her left ankle. As indicated above, Dr. Horton's records were not placed into evidence.

At the October 2012 preliminary hearing, claimant testified that after she was transferred to Lowther North, she noticed left knee symptoms when she was walking down steps at school to a storage area. She felt pain for no particular reason and had not had left knee pain before the incident. Claimant continued to work, but her work activities of carrying crates, going up and down stairs caused the left knee pain to worsen.

At her deposition, claimant testified that during the 2008-2009 school year she began experiencing low back pain. Lifting, carrying, standing and walking caused her back pain to increase. Claimant recalled an incident when she was standing in a storage area of her office and felt increased back pain that had not been there before. Claimant then

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<sup>3</sup> Brooks Depo. at 68.

testified she actually noticed pain while doing data entry. The back pain worsened when she reached for supplies.<sup>4</sup> On a scale of one to ten, with ten being the worst, claimant testified her pain was a nine. Claimant went to see Peggy Price, a school nurse, who gave claimant Aleve for her back. Claimant testified that since the incident, her back pain has continued. She also testified that she takes her husband's prescription Naproxen for her left knee, left ankle and back pain.

At the October 2012 preliminary hearing, claimant testified that in 2009, she first noticed having back problems when reaching to pick up a box of three-ring binders from a shelf:

Q. (Mr. Johnston) Now, you mentioned your low back problems started when you were reaching for some boxes and materials on a shelf at work, correct?

A. (Claimant) Correct.

Q. Had you had any symptoms in your low back prior to that incident of reaching for those materials?

A. I didn't have pain. I don't believe so. You know how you can tweak something, you know, but then you --

JUDGE AVERY: The pain started when you reached for the box?

A. Correct.

JUDGE AVERY: Okay. What date was that, if you remember?

A. No, no, sir.

JUDGE AVERY: Okay.

Q. (Mr. Johnston) Was it after you had been transferred to the sixth grade building?

A. (Claimant) Yes.<sup>5</sup>

Following the reaching incident, claimant continued performing her regular job duties and never received any treatment for her back condition. Since the reaching incident, claimant's back pain worsened, with the pain radiating into her right leg past the knee into the toes. Claimant testified that daily activities such as lifting and carrying boxes caused her back problems. She reported the low back injury to Dr. Horton in October 2009.

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<sup>4</sup> *Id.*, at 43-44.

<sup>5</sup> P.H. Trans. (Oct. 5, 2012) at 30-31.

Although claimant had left knee and low back pain since 2009, she did not seek medical treatment earlier because she was being treated for breast cancer.

At the request of her attorney, claimant was evaluated on March 31, 2009, by Dr. George G. Fluter. Dr. Fluter obtained a history from claimant and reviewed the records of Drs. Lepse, Fanning and Horton and Leighton York. The history Dr. Fluter obtained from claimant indicated that claimant was experiencing left ankle and foot pain. Claimant attributed this to favoring the right lower extremity and walking with an abnormal gait. Dr. Fluter assessed claimant with status post work-related injury, October 19, 2005; right foot/ankle sprain; chronic right ankle pain and left foot/ankle pain. He opined claimant's left ankle pain developed from her altered gait. He also assigned claimant restrictions.

Dr. Fluter again saw claimant on March 31, 2010. Claimant reported right ankle/foot pain, left ankle/foot pain, left knee pain and low back pain. She attributed her left ankle/foot pain, left knee pain and low back pain to an altered gait caused by the right ankle injury. Dr. Fluter's report indicated that no diagnostic tests of claimant's left lower extremity or low back had been conducted. In addition to the assessments Dr. Fluter made on March 31, 2009, Dr. Fluter added microfracture involving the lateral aspect of the dome of the right talus and left knee and low back pain related to gait alterations resulting from the right ankle injury. Dr. Fluter's reports do not set forth the incidents on the stairs when claimant experienced knee pain and when she reached for supplies and felt back pain.

KASB had claimant evaluated on June 18, 2010, by Dr. James S. Zarr. He took a medical history from claimant and reviewed claimant's medical records, including the two reports of Dr. Fluter. Dr. Zarr's impressions were persistent right ankle pain secondary to a sprain and complaints of low back, left knee and left ankle pain secondary to altered gait protecting claimant's right ankle pain. Dr. Zarr opined, "I feel the actual cause of her low back, left knee and left ankle pain is due to her current employment and she needs to follow *[sic]* new worker's compensation claim. I do not feel that the work injury of 10/19/05 is responsible for her current complaints of low back, left knee and left ankle pain."<sup>6</sup> Dr. Zarr's report does not make reference to the incidents on the stairs when claimant experienced knee pain or when she reached for supplies and felt back pain. Dr. Zarr did not order x-rays or any other radiographic tests of claimant's back or left lower extremity.

At the request of Netherlands, on September 28, 2010, claimant was evaluated by Dr. Edward J. Prostin. Claimant complained of right ankle, low back, left ankle and left knee pain. She attributed the low back, left ankle and left knee pain to an altered gait resulting from the right ankle injury. In addition to physically examining claimant and reviewing her medical records, Dr. Prostin had claimant's lumbar spine, right ankle, and left knee x-rayed. His opinion was as follows:

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<sup>6</sup> *Id.*, Resp. Ex. B at 4.

On or about October 19, 2005, Yvonne L. Brooks sustained injury to her right ankle during the course of her employment. She has chronic instability for which she should undergo lateral ligamentous reconstruction. Permanent partial impairment of the right lower extremity is 20%. She is reporting bilateral radicular symptoms that could be from central disc protrusion or lumbar spinal stenosis. At this time, I am unable to attribute the lumbar symptoms to the right leg injury. She has obvious osteoarthritis of the medial compartment of her left knee with likely a torn medial meniscus. I am unable to attribute the left knee difficulties to the right ankle as well.<sup>7</sup>

Apparently at a preliminary hearing scheduled for October 1, 2010, but not heard, ALJ Avery directed that claimant be independently evaluated by Dr. Terrence Pratt. There is no documentation in the administrative file that ALJ Avery ordered or directed claimant to be evaluated by Dr. Pratt, other than Dr. Pratt's IME report addressed to ALJ Avery. However, at Dr. Pratt's deposition, Netherlands' attorney indicated that Dr. Pratt's report was completed at the request of ALJ Avery. On January 28, 2011, Dr. Pratt took a history from claimant and physically examined her. Claimant gave a history of walking with an altered gait since October 19, 2005. Dr. Pratt's report indicated that in late 2009, claimant noted involvement of her left ankle, followed by low back and left knee involvement. With claimant's vocational activities she noted additional symptoms. Claimant related to Dr. Pratt of having low back symptoms when she was lifting and pulling.

Dr. Pratt opined that claimant's left ankle injury was not "a natural and probable consequence of her original injury. Symptoms were not reported until a number of years after her initial event and she reported developing symptoms while performing specific activities. So, therefore it appears to relate to a new event as opposed to her initial event."<sup>8</sup> Dr. Pratt also indicated claimant's left knee injury was not a natural and probable consequence of her original injury and felt it was a new injury occurring in 2009. He testified that claimant's work activities in late 2009 aggravated her left knee condition. With regard to claimant's low back symptoms, Dr. Pratt stated, "I would not consider the low back involvement as a natural and probable consequence of her original injury. It would be considered as separate or new. I would not consider the degenerative changes to relate to a specific event."<sup>9</sup> Dr. Pratt testified that claimant's work activities aggravated the degeneration in claimant's low back.

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<sup>7</sup> *Id.*, Resp. Ex. A at 3-4.

<sup>8</sup> Pratt Depo., Ex. 1 at 5.

<sup>9</sup> *Id.*

**PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>10</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>11</sup>

Claimant sustained a right ankle injury on October 19, 2005. She testified the injury occurred at work on a Wednesday and she returned to full duty the following Monday. Claimant testified she had an altered gait ever since the date of accident, and asserts her left knee, left ankle and low back injuries resulted from the altered gait. The only medical expert to support claimant’s assertion was provided by Dr. Flutter. Drs. Zarr, Prostic and Pratt opined claimant’s left knee, left ankle and low back injuries could not be attributed to her right ankle injury. Drs. Zarr and Pratt indicated claimant’s left knee, left ankle and low back injuries were the result of work activities subsequent to the October 19, 2005, accident. This Board Member finds that claimant’s left knee, left ankle and low back injuries are not the natural and probable consequence of her October 19, 2005, accident. Claimant failed to prove by a preponderance of the evidence that she sustained left knee, left ankle and low back injuries by accident on October 19, 2005, arising out of and in the course of her employment.

ALJ Avery made no findings as to whether claimant sustained left knee, left ankle and low back injuries through a series of repetitive accidents arising out of and in the course of her employment with respondent. Therefore, in light of this Board Member’s findings, that issue remains to be decided.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>13</sup>

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<sup>10</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>11</sup> K.S.A. 2005 Supp. 44-508(g).

<sup>12</sup> K.S.A. 2011 Supp. 44-534a.

<sup>13</sup> K.S.A. 2011 Supp. 44-555c(k).



**CONCLUSION**

Claimant failed to prove by a preponderance of the evidence that her left ankle, left knee and back injuries were a natural and probable consequence of her single traumatic accident on October 19, 2005.

**WHEREFORE**, the undersigned Board Member reverses the October 8, 2012, Preliminary Hearing Order entered by ALJ Avery. This claim is remanded to ALJ Avery to make findings as to whether claimant sustained left knee, ankle and low back injuries through a series of accidents arising out of and in the course of her employment with respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2013.

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THOMAS D. ARNHOLD  
BOARD MEMBER

c: James B. Biggs, Attorney for Claimant  
jbiggs@cavlem.com; tcampbell@cavlem.com

Anton C. Andersen, Attorney for Respondent and KASB  
aandersen@mvplaw.com; mvpkc@mvplaw.com

Jason M. Lloyd, Attorney for Respondent and Netherlands  
Jason.Lloyd@libertymutual.com

Brad E. Avery, Administrative Law Judge